BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad

ISSUE DATE: September 27, 2004

DOCKET NO. P-5692, 421/CI-04-804

ORDER DIRECTING QWEST TO FILE COMMERCIAL AGREEMENTS

PROCEDURAL HISTORY

On May 14, 2004, Qwest Corporation (Qwest) and DIECA Communications d/b/a Covad (Covad) filed two agreements with the Commission. The parties offered one agreement, entitled "Commercial Line Sharing Agreement" (First Agreement), for Commission approval pursuant to the 1996 Act.[1] The parties offered the second agreement, entitled "Terms and Conditions for Commercial Line Sharing Agreement" (Second Agreement), for informational purposes only, and argue that the Commission need not take any action on it. The current docket addresses the Second Agreement.

On June 21, 2004, AT&T Communications of the Midwest, Inc., and AT&T Local Services on behalf of TCG Minnesota, Inc., (AT&T) filed comments on this matter.

On July 20, 2004, the Commission received comments from both the Minnesota Department of Commerce (the Department) and Qwest.

This matter came before the Commission on August 19, 2004.

[1] See *In the Matter of the Joint Application for Approval of the March 14, 2004 Amendment to the Interconnection Agreement Between Qwest Corporation (Qwest) and DIECA Communications dba Covad Communications Company (Originally Approved in Docket No. P-5692, 421/CI-99-196); Regarding Commercial Line Sharing*, Docket No. P-5692, 421/IC-04-746.

FINDINGS AND CONCLUSIONS

I. Background

Congress adopted the Telecommunications Act of 1996[2] (the 1996 Act) to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The 1996 Act opens markets by, among other things, requiring each incumbent telephone company to offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to competitors without requiring the competitor to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[3] The 1996 Act authorizes the Federal Communications Commission (FCC) to identify elements that are subject to unbundling.[4] Agreements between telecommunications carriers for the provision of UNEs must be submitted for Commission review and approval.[5]

Also, to encourage cooperation by incumbent Bell operating companies (BOCs), the 1996 Act's § 271 provides for BOCs to gain authority to sell long-distance telecommunications service if they can demonstrate that they have opened their local markets to competition.

On October 2, 2003, the FCC's Triennial Review Order[6] took effect, revising the rules governing the provision of UNEs,[7] including the high-frequency portion of the local loop (HFPL).[8] Among other things, the Order states that incumbents need not accept new requests from competitors for the HFPL after October 1, 2004, and gradually phases out the obligation to serve some existing HFPL orders.

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[2] Pub. L. No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[3] 47 U.S.C. § 251(c).

[4] 47 U.S.C. § 251(d)(2)(B).

[5] 47 U.S.C. § 252(e).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (released August 21, 2003).

[7] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq.*

[8] Triennial Review Order ¶¶ 251-269. A "loop," or wire that connects a residence to a telecommunications carrier's office, permits the transmission of signals throughout a range of the electromagnetic spectrum simultaneously, much like competing radio stations can transmit signals at various frequencies simultaneously. Whereas voice signals use the low-frequency portion of the loop, other signals – especially high-capacity signals conveying internet traffic – can use the high-frequency portion of the loop, or HFPL. While a telephone company must still permit a competitor to lease a customer's loop, the Triennial Review Order reduces the company's obligation to lease the HFPL separately, "unbundled" from the loop.

On March 2, 2004, a court vacated and remanded several of the Triennial Review Order's rules regarding UNEs, although not the parts pertaining to the HFPL specifically.[9] Given the unsettled state of the law, the FCC subsequently encouraged all telecommunications providers to voluntarily negotiate commercial agreements without awaiting final resolution of all parties' legal obligations.[10]

On May 14, 2004, Covad and Qwest filed the commercial agreements that initiated this docket. The First Agreement pertains to HFPL orders received by October 1, 2004; the Second Agreement pertains to HFPL orders received thereafter.

II. Comments of the Parties

A. AT&T

AT&T argues that the Commission has jurisdiction over the Second Agreement pursuant to the 1996 Act and Minnesota law to review the agreement,[11] approve or disapprove it,[12] and make its terms available to other carriers.[13]

This Commission has discretion to determine initially which agreements constitute "interconnection agreements" for purposes of the 1996 Act, AT&T argues, based on the following FCC finding:

> [S]tate commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and if so, whether it should be approved or rejected.[14]

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[9] *United States Telecom Ass'n v. FCC*, 359 F.3d 553, 564-76 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

[10] See, for example, the FCC's "Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps" (March 31, 2004).

[11] 47 U.S.C. § 252(e)(1).

[12] 47 U.S.C. § 252(e)(2).

[13] 47 U.S.C. § 252(h) and (i).

[14] *Qwest Corporation International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, FCC 02-276 (released October 4, 2002) ("Declaratory Order") at ¶ 10.

The FCC has offered guidance in this matter, however, ruling that any –

> agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an "interconnection agreement" that must be filed pursuant to [the 1996 Act].[15]

While the FCC acknowledges some exceptions to this general principle,[16] AT&T argues that none of these exceptions apply to the Second Agreement.

B. Qwest

Qwest acknowledges that the Commission has jurisdiction over the First Agreement, because it would create ongoing obligations between the parties regarding UNEs. In contrast, Qwest argues that the Commission lacks jurisdiction over the Second Agreement because it only pertains to orders for line sharing using the HFPL after October 1, 2004, and the HFPL is no longer a UNE subject to the 1996 Act. The FCC has ruled that "contracts that do not affect an incumbent LEC's ongoing obligations relating to Section 251 [of the 1996 Act] need not be filed"[17] and "...only those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under 252(a)(1)" of the 1996 Act.[18]

Qwest disputes AT&T's claim that state law provides authority for reviewing the Second Agreement. Qwest asserts that the Commission has not previously reviewed commercial agreements between parties unrelated to the 1996 Act, and Qwest urges the Commission not to do so now.

C. The Department

The Department agrees with Qwest that the Commission need not approve or reject the Second Agreement. However, the Department agrees with AT&T that the Commission has the authority under both federal and state law to require parties to file such agreements for Commission review, and that the Commission should exercise that authority.

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[15] *Id.* at ¶ 8.

[16] *Qwest Corporation Apparent Liability for Forfeiture*, FCC Docket 04-57, Notice of Apparent Liability for Forfeiture (released March 12, 2004) at ¶ 23. Exceptions include 1) agreements addressing dispute resolution and escalation provisions, 2) settlement agreements that provide only retroactive relief, 3) forms used to obtain service, and 4) certain agreements entered into in bankruptcy.

[17] Declaratory Order, ¶ 8.

[18] Declaratory Order, n. 26.

The Department concludes that the Second Agreement is not an interconnection agreement. After thorough review, the Department concludes that the Second Agreement pertains only to orders for line sharing using the HFPL after October 1, 2004, and the HFPL is no longer a UNE. According to the Department, the Second Agreement does not create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, or otherwise contain an ongoing obligation relating to the 1996 Act. Consequently, the Department concludes that the Second Agreement does not require Commission approval.

Nevertheless, the Department recommends that the Commission direct Qwest to file agreements such as the Second Agreement for review. The Department notes that the Commission's authority to require disclosure is not limited to interconnection agreements. In particular, the Commission has authority to investigate matters related to telecommunications service[19] and to issue orders affecting the deployment of infrastructure.[20]

Requiring Qwest to file such agreements would help the Commission to determine if the agreements require approval as interconnection agreements. The FCC has determined that the states have the authority to determine which agreements require approval pursuant to the 1996 Act. The only way for the Commission to exercise this authority is to review the agreements that might potentially require review and approval.

Specifically, the Department recommends that the Commission direct Qwest to file agreements creating an ongoing obligations with competitors. These would include 1996 Act interconnection agreements, plus any other agreements that 1) are associated with elements of Qwest's network, 2) make reference to a UNE, 3) reflect a § 271 obligation, or 4) reflect a state obligation. State obligations include the obligation to file charges for telecommunications services and elements, and to refrain from discriminating in the provision of those services and elements.[21]

In this case the Second Agreement creates ongoing obligations between the parties and is associated with Qwest's 1996 Act obligations. Consequently, the Department argues, the Second Agreement warrants review. Moreover, because the FCC has not entirely eliminated HFPL obligations,[22] the Department recommends that any agreements related to HFPLs be filed for Commission review because they pertain to past HFPL UNE obligations.

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[19] Minn. Stat. § 237.081.

[20] Minn. Stat. § 237.082.

[21] Minn. Stat. §§ 237.07, 237.09.

[22] Triennial Review Order ¶¶ 264-69.

III. Commission Action

Neither Covad nor Qwest has asked the Commission to review their agreement for compliance with the 1996 Act, and the Department concludes that the Commission need not address that question at this time. The Commission finds these arguments persuasive, and will decline to address that question here.

However, the Commission is persuaded of the merits of directing Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute "interconnection agreements" for purposes of the 1996 Act. Specifically, the Commission will direct Qwest to file agreements that –

- are associated with elements of Qwest's network,
- make reference to UNEs,
- reflect a § 271 obligation, or
- reflect a state obligation.

Reviewing such agreements will provide the Commission with information about the evolution of competition in the state generally. Also, the Commission finds that it must review agreements to determine whether or not they violate state prohibitions on discrimination or otherwise warrant approval (or rejection) pursuant to the 1996 Act. Failure to file the necessary agreements can harm the development of the competitive local exchange market.[23] By requiring Qwest to file such agreements, the Commission will provide itself and competing firms with the means to review the agreements' terms. Competitors will then be able to advise the Commission whether or not the agreements warrant additional Commission action.

ORDER

1. Qwest Corporation (Qwest) shall file for review all agreements, such as the Qwest/Covad Line Sharing Agreement, that –

   - are associated with elements of Qwest's network,
   - make reference to UNEs,
   - reflect a § 271 obligation, or
   - reflect a state obligation.

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[23] See *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 ORDER ASSESSING PENALTIES (February 28, 2003), ORDER AFTER RECONSIDERATION ON OWN MOTION (April 30, 2003).

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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